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Breaking Into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgment

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This article discusses the concept of political recognition (both federal and state) of Indian tribes; explains the difference between administrative and legislative recognition; examines who is or should be empowered to extend federal recognition, the Congress or the executive branch; discusses the major factors that have compelled the Lumbees to seek federal recognition when they were already acknowledged by the state; and examines the major factors that have precluded them from securing complete federal recognition.

This article examines the efforts of the Lumbee Nation,[1] a majority of Robeson County's[2] indigenous population, to establish a government-to-government relationship with the United States via the federal recognition process. We address this by attempting to answer two broad questions: (1) why do the Lumbees want federal recognition when they already have a measure of state recognition and (2) what major factors have precluded federal acknowledgment after more than 100 years of concerted, though punctuated, political effort?

While a vast literature exists on federal-state-local relations, comparatively little has been generated on the tribal role in the intergovernmental matrix.[3] This is a fascinating and troublesome oversight when we ponder the unique political status

[1]While a voluminous literature exists on Lumbees in general, the two standard historical/anthropological works are Adolph Dial and David Eliades, *The Only Land I Know* (San Francisco: Indian Historian Press, 1975) and Karen I. Blu, *The Lumbee Problem: The Making of an American Indian People* (New York: Cambridge University Press, 1980). See also Jack Campisi, *The Lumbee Petition* (Pembroke, N.C.: Lumber River Legal Services, 1987); Adolph Dial, *The Lumbees: Southeast* (New York: Chelsea House, 1992), and Gerald M. Sider, *Lumbee Indian Histories: Race, Ethnicity and Indian Identity in the Southern United States* (New York: Cambridge University Press, 1993).

[2]Robeson County, located in southeastern North Carolina, is the second largest county in the state. It is uniquely tri-racial. Of the total population of slightly more than 100,000, blacks = 26.2 percent, whites = 42.8 percent, and Indians = 30.5 percent.

[3]But see Deil S. Wright, *Understanding Intergovernmental Relations* (3rd ed.; Pacific Grove, Cal.: Brooks/Cole, 1988) who in this edition introduced a section on Indian affairs.

of recognized tribes in the United States. Politically and legally, their uniqueness stems from their being the original sovereigns of this portion of the western hemisphere. In addition, the U.S. Constitution, explicitly in the commerce clause and by application of the treaty clause (tribes negotiated over 400 treaties with the United States), acknowledged the separate and autonomous nature of tribal nations.

The de facto existence of tribal nations, along with the constitutional affirmation of their autonomy, has normally meant that exclusive (or plenary) authority has been vested in the Congress to regulate federal affairs with Indian tribes. This article focuses principally on Lumbee-federal interaction, which has major implications for Lumbee-state relations because of the doctrine of congressional plenary power. This is more interesting, however, when some tribes, like the Lumbee, secure a degree of political acknowledgment from a state before pursuing political relations with the federal government.

WHY FOCUS ON THE LUMBEE?

For the duration of this study, we will focus on the Lumbee tribe, although there are other indigenous groups in the county which insist that they are also distinctive political-cultural tribal polities. This tribal differentiation—the separation of Robeson County's indigenous population into several politically, if not culturally, disparate groups—and the ramifications of this segmentation for internal tribal dynamics and intergovernmental relations is a powerful dynamic affecting the Lumbees' quest for federal acknowledgment. This is arguably the most persistent conundrum confronting the county's indigenous population, especially as it pertains to the tribe's efforts to project a common tribal identity that might facilitate federal recognition.

The indigenous population of Robeson County is segmented into seven tribal organizations.[4] Each group is pursuing an independent path toward federal recognition. This is not the forum to detail the controversial developments leading to this recent proliferation of differentiated groups in Robeson County.[5] This splintering and the lack of consensus among the various competing political, yet biologically related, groups have made it more difficult for the Lumbees to secure federal acknowledgment and for the other groups to gain state or federal recognition.

This has been most evident since the latest administrative and legislative recognition push began in the late 1980s. Before then, the Lumbee tribe generally understood itself internally and presented itself externally as a relatively cohesive

[4]These are: Lumbee Tribe of Cheraw Indians, Hatteras Tuscarora Tribe, Cherokees of Robeson and Adjoining Counties, Tuscarora Indian Tribe of Drowning Creek Reservation, Tuscarora Tribe of North Carolina, Eastern Carolina Tuscarora Indian Organization, and Tuscarora Nation of North Carolina.

[5]The first organization to be formed was the Eastern Carolina Tuscarora Indian Organization in 1970. This group was seemingly dissatisfied with the name Lumbee and wanted to establish connections to a more traditional name. Internal conflicts, however, soon led to the splintering of this group into several factions. See Ruth Y. Wetmore, *First on the Land: The North Carolina Indian* (Winston Salem, N.C.: John F. Blair, 1975), pp. 168-169.

people. However, since the formation of the first splinter group, the Eastern Carolina Tuscarora Organization in 1970, this general group cohesion has been shattered. Thus, when the early versions of the Lumbee recognition bill were introduced in Congress during the 1980s, the measures were vigorously opposed by the non-Lumbee indigenous groups. The general fear of these fragments was that they would be subsumed under the Lumbee tribe and would not be allowed to petition the federal government separately for recognition.[6]

This indigenous segmentation also creates uncertainty and confusion among outsiders about Lumbee identity. For instance, the federally recognized Eastern Band of Cherokee has been a stalwart opponent of Lumbee recognition for many years. In part, their resistance results from the fact that the members of one of the splinter groups in Robeson County consider themselves to be Cherokees. The Eastern Band of Cherokee, however, refuses to believe that this group is Cherokee. Jonathan Taylor, their former chief, stated as much in testimony against the Lumbee bill in 1988: "[t]here are only two Cherokee Tribes; one of them is in North Carolina [the Eastern Band] and the other one is in Oklahoma."[7]

Notwithstanding the importance of tribal segmentation, we concentrate on the Lumbee for several reasons. First, the Lumbee tribe dwarfs the other factions/tribes in population size. The Lumbees are by far the largest nonrecognized Indian tribe in the country, outnumbering the second largest petitioning tribe threefold. There are an estimated 39,000 enrolled Lumbees; the combined population of the other six Robeson County groups amounts to about 1,750 people.

Second, it is widely acknowledged that the Lumbees have been studied by various government officials and by the academic community "more often and in more depth than any tribe not presently acknowledged by the Department of the Interior."[8] Third, the Lumbees are one of a handful of tribal groups that was informed by the associate solicitor of Indian affairs of the Department of the Interior that they were precluded from using the administrative process for recognition established by the Bureau of Indian Affairs (BIA) in 1978.

Third, a focus on the Lumbees is warranted because their original (1956) acknowledgment legislation arose in an era, "the termination years,"[9] when the federal government legislatively and unilaterally severed its political relationship with a number of tribes, bands, and *rancherias* (small Indian reservations in California). The termination years have been replaced by "the tribal self-determination" era (1970 to present), and a majority of the tribes and Indian groups terminated in the 1950s and 1960s have been restored to federal status. The Lumbee tribe remains, politically speaking, frozen in time—connected to an aberrant policy period that has been forcefully repudiated by the Congress and the executive branch.

[6]See Congressman Charlie Rose's (D-NC) comments in the *Congressional Record,* 103rd Cong., 1st sess., 1993, Vol. 139, p. 344.

[7]U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 2672: Federal Recognition of the Lumbee Indian Tribe of North Carolina,* 100th Cong., 2nd sess., 1988, p. 36.

[8]U.S. Congress, Senate, Select Committee on Indian Affairs, *Testimony of Arlinda Locklear, Lumbee Staff Attorney, on S. 1036 and H.R. 1426,* 102nd Cong., 1st sess., 1991.

[9]67 Stat. B132 (1953). This policy era lasted from 1953 into the 1960s.

WHAT IS POLITICAL RECOGNITION?

Federal recognition has historically had two distinctive meanings. Before the 1870s, "recognize" or "recognition" was used in the cognitive sense. In other words, federal officials simply acknowledged that a tribe existed.[10] During the 1870s, however, "recognition," or more accurately, "acknowledgment," began to be used in a formal jurisdictional sense. It is this later usage that is most often used today by the federal government to describe its relationship to tribes. In short, it is a formal act that establishes a political relationship between a tribe and the United States. Federal acknowledgment affirms a tribe's sovereign status. Simultaneously, it outlines the federal government's responsibilities to the tribe.

More specifically, federal acknowledgment means that a tribe is not only entitled to the immunities and privileges available to other tribes, but is also subject to the same federal powers, limitations, and other obligations of recognized tribes. What this means, particularly the "limitations" term, is that "acknowledgement shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected."[11] In short, tribes are informed that they are now subject to federal plenary power and may, ironically, benefit from the virtually unlimited and still largely unreviewable authority of the federal government. For example, they have exemptions from state tax laws, enjoy sovereign immunity, and are not subject to the same constitutional constraints as are the federal and state governments.

As Vine Deloria has observed, "a substantial number of presently-recognized Federal Indian tribes have been recognized in this century, the majority of whom have been recognized through Congressional act."[12] While the present administrative process of federal recognition of tribes was established under general authority delegated by the Congress to the Interior Department, "there is no specific statutory authority for the process. Hence, the substantive criteria applied in the present administrative process and the procedures used by the Department in processing petitions are wholly administrative in origin."[13]

While this is also the view expressed by the U.S. Senate Committee on Indian Affairs, it is by no means the unanimous legislative perspective. The Ronald Reagan and George Bush administrations and key congressional members argued that the administrative process developed in 1978 was the more appropriate path for tribes to follow in pursuit of federal acknowledgment. As Representative Jay Rhodes (R-AZ) noted, "Which forum is the more appropriate [one] for determining Federal recognition? Is it with Congress or is it with the Secretary of the Interior?" Rhodes said, "I firmly believe that the recognition process established within the Department of the Interior is the more appropriate forum."[14]

[10]See William Quinn, Jr., "Federal Acknowledgement of American Indian Tribes? The Historical Development of a Legal Concept," *The American Journal of Legal History* 34 (October 1990): 331-363.

[11]56 *Federal Register* 47,325 (1991).

[12]U.S. Congress, Senate, Select Committee on Indian Affairs, *Testimony of Deloria on S. 2672,* 100th Cong., 2nd sess., 1988, p. 24.

[13]S. Rept. 102-251, 26 November 1991, p. 10.

[14]*Congressional Record,* 102nd Cong., 1st sess., 1991, Vol. 137, p. H6890.

Deloria, however, raised a counterargument in 1988 on why the Congress, not the administration, should be the body to extend federal recognition. In rebutting then Assistant Secretary Ross Swimmer's testimony that it was unfair for the Lumbees to petition the Congress directly, thereby avoiding BIA's process without according that same right to all other petitioning tribes, Deloria stated that it was unfair to ask tribes to go directly to BIA for acknowledgment because "the BIA must stand in an adversarial role to that [the petitioning] Indian community and force the Indian community to prove itself to the Bureau. The Bureau then would certify it as an Indian tribe and turn around and ask it to be in a trust relationship with it."[15]

The debate over administrative versus legislative recognition rages on, with some advocates from each camp asserting their exclusive right to extend or withhold recognition. This raises an important point: Is there a qualitative difference between the two types of recognition? There are two important differences. First, tribes that opt for the administrative variety must meet a formalized set of eligibility criteria.[16] Tribes that pursue congressional legislation, provided they can muster enough proof that they are a legitimate group composed of people of Indian ancestry, have to make a compelling case to the congressional representative(s) of the state they reside in. The congressional sponsor(s) then makes the case for the tribe via legislation.

The second major difference involves the administrative law component known as "subordinate delegation."[17] The major grant of authority the Congress has delegated to the secretary of the interior is located in Title 25—*Indians*—of the United States Code. Section 1 states that the head of Indian affairs, formerly the commissioner of Indian affairs, today the assistant secretary of Indian affairs, is "appointed by the President, by and with the advice and consent of the Senate."[18] In section 2, the head is authorized to "have the management of all Indian affairs and of all matters arising out of Indian relations."[19] As William Quinn states, this law "would arguably not authorize the Secretary or Commissioner to establish a perpetual government-to-government relationship via federal acknowledgment with an Indian group not already under the Department's aegis."[20] Nevertheless, Quinn asserts that the secretary of the interior, with the U.S. Supreme Court's approval, has historically exercised the authority to "recognize" tribes "when a vacuum of responsibility existed over decades, resulting in a gradual and unchallenged accretion of this authority."[21]

The problem, however, is not that the secretary is usurping unused congressional authority; instead, it is the manner and degree to which secretarial discretion and

[15]U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 2672: Federal Recognition of the Lumbee Indian Tribe of North Carolina,* 100th Cong., 2nd sess., 1988, p. 25.

[16]See below, which details the seven major criteria.

[17]See William W. Quinn, Jr., "Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83," *American Indian Law Review* 17 (Fall 1992): 37-61.

[18]25 U.S.C. Chapter 1, Section 1, p. 961.

[19]Ibid., p. 962.

[20]Quinn, "Federal Acknowledgement of American Indian Tribes," 48.

[21]Ibid., 52.

interpretation of federal laws have been discharged by BIA officials. As Felix Cohen said forty years ago, "Indians for some decades have had neither armies nor lawyers to oppose increasingly broad interpretations of the power of the Commissioner of Indian Affairs, and so little by little 'the management of all Indian affairs' has come to be read as 'the management of all the affairs of Indians'."[22] This statement has relevance today, notwithstanding the federal government's policy of Indian self-determination and the more recent experimental policy of tribal self-governance, which allows certain tribes to set their own budgets, run their own programs, and negotiate directly with the federal government for certain services.[23]

The Congress' track record is problematic as well. Generally speaking, however, tribes with explicit congressional acknowledgment have found their status less subject to the whims of BIA officials, though even that is no guarantee of smooth affairs because BIA oversees and administers most of the federal government's political relationship with tribes.[24] The Congress has, moreover, in recent years tried to reassert its constitutional authority in the field by introducing legislation that would have transferred administrative and congressional consideration of applications for federal recognition to an independent commission.[25]

TRIBAL RECOGNITION/TRIBAL TERMINATION

Given that the Lumbee tribe has been in active pursuit of either federal acknowledgment or federal aid for over 100 years, two major questions require explanation: (1) why have the Lumbees sought federal acknowledgment when they already have a measure of state acknowledgment, and (2) why have they not received complete recognition to date?

[22]Felix Cohen, "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy," *Yale Law Journal* 62 (February 1953): 352.

[23]See, e.g., Robert A. Nelson and Joseph F. Sheley, "Current B.I.A. Influence on Indian Self-Determination," *Social Science Journal* 19 (July 1982): 73-85 and the statement of Joe De La Cruz, chairman of the Quinault Tribal Business Committee, who said that despite legislation, BIA had not cooperated with the tribes in the self-governance experiment (U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on Initiative for the 1990s,* 101st Cong., 2nd sess., 1990, p. 17).

[24]A prime example involves the Pascua Yaqui tribe of southern Arizona. The Yaqui were legislatively recognized in 1978 (92 Stat. 712). However, in the late 1980s, when they solicited the approval of BIA on some changes in their tribal constitution, they were informed by BIA that they were limited in what governmental powers they could exercise because they were not a "historic tribe," but were instead merely a "created adult Indian community."

> A *historic tribe* has existed since time immemorial. Its powers derive from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been removed by Federal law in favor of either the United States or the state in which the tribe is located. By contrast, a community of *adult Indians* is composed simply of Indian people who reside together on trust land. A community of adult Indians may have a certain status which entitles it to certain privileges and immunities. . . . However, that status is derived as a necessary scheme to benefit Indians, not from some historical inherent sovereignty (Letter from Carol A. Bacon, acting director of the Office of Tribal Services, BIA, 3 December 1991).

The Bureau's attempt to distinguish the Yaqui from other tribes is a novel and disturbing approach to determining tribal identity.

[25]See U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 1315: Indian Federal Recognition Administrative Procedures Act of 1991,* 102nd Cong., 1st sess., 1991. This legislation died when the Congress adjourned in 1991.

Before addressing the first question, however, we need to consider a larger question: to which tribes does the United States have a legitimate responsibility—all Indian groups or only those tribes that can show prior political involvement with the federal government? When we examine the historical and legal records, as well as federal policy enunciations, it is evident that the federal government is legally and morally obligated to provide both recognition and financial and technical support for all tribes.

Senator Daniel Inouye (D-HI) brought this out in his cosponsored bill introduced in 1989[26] which would have amended BIA's acknowledgment procedures by (1) establishing a statutory basis for administrative recognition, (2) establishing an independent Office of Federal Acknowledgment that would be "free from political pressure," and (3) authorizing federal grants for which petitioning tribes could compete in order to help them conduct the research necessary to substantiate their petitions. Section 2 of S. 611 stated that: "The first Congress, by enacting the Act of July 22, 1790 (1 St. 137), recognized a special government-to-government relationship with all of the Indian tribes of the United States, whether or not the Indian tribes subsequently entered into special treaty relations with the United States." Moreover, the Snyder Act of 1921 gave the secretary of the interior general authority to expand appropriated federal dollars "for the benefit, care, and assistance of the Indians throughout the United States."

If this federal trust[27] obligation was absent, the Congress would have ceased enacting recognition legislation, and BIA would not have been compelled by the federal courts to establish procedures and criteria by which to establish political relations with previously nonrecognized tribes. The Congress has, of course, empowered itself with the authority to abrogate treaties,[28] confiscate tribal lands without providing just compensation,[29] impose federal criminal jurisdiction on Indian Country without constitutional authorization,[30] and unilaterally terminate the legal status of Indian tribes.[31] However, in the area of acknowledgment, the

[26]U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 611: Federal Acknowledgement Administrative Procedures Act of 1989,* 101st Cong., 1st sess., 1989, Pts. 1 and 2.

[27]The federal government's relationship to tribes is delineated either (1) in ratified treaties and agreements with individual tribes; (2) by the international law doctrine of trusteeship, first articulated in papal bulls and related documents during the time of European encounters with the non-Western worlds when the European nations assumed a protective role over tribes and their territories; or (3) in specific acts applicable to all Indians. See Vine Deloria, Jr., *A Brief History of the Federal Responsibility to the American Indian* (Washington, D.C.: U.S. Department of Health, Education and Welfare, 1979). Moreover, there are two conflicting legal interpretations of the "trust" relationship. One view holds that when Indians were enfranchised, they effectively lost their rights to special federal services they had received under treaties, agreements, or statutes. The other view asserts that Indians retained their tribal treaty and special statutory rights even after being enfranchised by federal and state laws. They had, in effect, dual, later triple, citizenship (tribal, federal, and state).

Tribes qua tribes are not citizens, and these sovereignties remain extraconstitutional polities not generally subject to the U.S. Constitution's constraints or eligible for its protections. Thus, the U.S. Bill of Rights is inapplicable to the acts of tribal governments, although certain portions of the first ten amendments were applied to tribal governments by the Indian Civil Rights Act of 1968 (82 Stat. 77).

[28]*Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903).

[29]*Tee-Hit-Ton* v. *United States,* 348 U.S. 272 (1955).

[30]*United States* v. *Kagama,* 118 U.S. 375 (1886).

[31]The Termination Policy, 67 Stat. B132 (1953).

Congress has, over time, applied an ad hoc policy of extending federal recognition to petitioning tribes.

LUMBEE-NORTH CAROLINA RELATIONS

Various reasons have been given by the Lumbees for their desire to secure federal acknowledgment in addition to maintaining and expanding their state recognition. We will discuss these shortly. Before addressing these, we need to examine more closely the Lumbees' relationship to the State of North Carolina.

The general subject of tribal-state relations has received little scholarly attention, even in the western states, where a majority of tribes and reservations are located. In the West, such issues as water rights, Indian gaming, civil jurisdiction, taxation, social services administration, and natural resources often dominate the political relations between tribes and states.[32]

The situation in the eastern states, particularly the thirteen original states, is more confused. Under the Articles of Confederation, Article Nine gave the Congress the exclusive right to regulate trade with tribes, while also providing that the "legislative right of any state within its own limits be not infringed or violated." Hence, in practice, it was unclear which polity—the states or the federal government—had authority in the field of Indian affairs.[33] The only certainty was that the federal government had jurisdiction over western Indian affairs. However, jurisdiction was problematic in the thirteen original states, which had "internalized" relations with particular tribes. "In such cases those states continued programs already established during the colonial period."[34] This did not apply to the Lumbee for several reasons.

First, the Lumbees were a relatively small and powerless tribe during the formative years when the state government was becoming established. Second, they settled in an area of North Carolina that enabled them to avoid prolonged contact with the colonial, later state, government. Third, they were largely ignored by the federal government because they posed no military threat to the United States' expansion, did not inhabit lands deemed desirable by an overwhelming number of settlers, and were perceived to have been a largely incorporated tribe in relation to the state's political and economic infrastructure.[35]

Collectively, the Lumbee tribe had few formal relations with the state before the 1880s. This era of nonpolitical relations began to change after the Civil War when the state legislature enacted a law that provided for separate white and Negro schools. The Lumbees then sought political redress from the state because they were denied admittance to white schools and refused to send their children to Negro schools.[36] Gradually, the county's Democratic leadership became aware of the

[32]See, e.g., Frank Pommersheim, "Tribal-State Relations: Hope for the Future," *South Dakota Law Review* 36 (Summer 1991): 239-276 and B. Kevin Gover, Catherine Baker Stetson, Susan M. Williams, Jana L. Walker, Jane Marx, Connie L. Hart, and Cindi Pearlman, "Tribal-State Dispute Resolution: Recent Attempts," *South Dakota Law Review* 36 (Summer 1991): 277-298.

[33]S Lyman Tyler, *A History of Indian Policy* (Washington, D.C.: U.S. Government Printing Office, 1973), pp. 33-34.

[34]Ibid., p. 32.

[35]See Adolph Dial, "From Adversity to Progress," *Southern Exposure* 13 (November 1985): 86.

[36]Jack Campisi, *The Lumbee Petition* (Pembroke, N.C.: Lumber River Legal Services, 1987), p. 30.

tribe's growing voting potential. The state's response was enactment of a law in 1885 which acknowledged the Lumbee as The Croatan Indians of Robeson County[37] but did not create a framework for a political relationship. What this law did was to establish a separate school system for tribal members. The Lumbees (Croatans) were able to parlay their growing political clout into additional state legislation that established the Croatan Normal School, which was under exclusive Indian control. The Croatan, in effect, were enjoying rights of educational control that were completely denied to western, federally recognized tribes. This is evidenced in a 1921 law, which stated:

> [I]n order to protect the public schools in Robeson County for the education of the *Indian race only,* there shall be a committee composed of Indians who are residents . . . and that all questions affecting the race of those applying for admission into the public schools of Robeson County for the Indian race only shall be referred to the committee . . . who shall have original, exclusive jurisdiction to hear and determine all questions . . . about the race of applicants.[38]

Officially, the Indians of Robeson County were still known as the "Cherokee Indians of Robeson County," and they remained "entitled to all the rights and privileges heretofore or hereafter conferred by any law or laws of the State of North Carolina upon the Indians."[39] This meant that they were entitled to continued state appropriations for their schools and also to separate accommodations at the State Hospital for the Insane, the local jails, and the Home for the Aged and Infirm of the county.[40]

In the early 1950s, a campaign was begun by several prominent local Indians to have the tribe's name changed again. The Reverend Doctor F. Lowry, the leader of this movement, argued that because the tribe was comprised of members from various tribes, no single historical tribal name was appropriate. He suggested that the tribe adopt a more geographic name.[41] The name chosen was Lumbee, which was derived from the Lumber River that flows through the county.

In 1953, the state enacted a law designating them as the "Lumbee Indians of North Carolina."[42] The Lumbees were informed that they would "continue to enjoy all rights, privileges, and immunities enjoyed by them as citizens of the State as now provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law."[43] This law is often interpreted as an extension of "recognition," but a credible case can be made that the state still had not explicitly defined the services to which the tribe was entitled, the immunities to which recognition entitled the recognized tribe, and the aspects of self-government the state was willing to acknowledge.[44]

[37]N.C. Public Laws, 1885, Chapter 51, pp. 92-94.
[38]N.C. Public Laws, 1921, Chapter 426, pp. 574-575.
[39]N.C. Public Laws, 1913, Chapter 123, pp. 215-216.
[40]N.C. Public Laws, 1911, Chapter 215, pp. 354-355.
[41]Campisi, *The Lumbee Petition,* p. 93.
[42]N.C. Public Laws, 1953, Chapter 874, p. 747.
[43]Ibid.
[44]See Arlinda Locklear, "Recognition," *Public Policy and Native Americans in North Carolina: Issues for the '80s,* ed. Susan M. Presti (Raleigh: North Carolina Center for Public Policy Research, 1981), p. 56.

REASONS FOR SEEKING FEDERAL RECOGNITION

The Lumbees followed upon this state action two years later by having a bill introduced in the Congress on their behalf by Representative Frank Carlyle (D-NC), which would have extended federal recognition to the tribe's members. We will discuss this further below. Let us return to the major reasons the tribe has sought federal recognition. These reasons can be grouped in three major categories: (1) political/legal; (2) fiscal; and (3) normative.

Political/Legal

Federal acknowledgment would recognize in the Lumbee tribe a measure of sovereignty over their own territory and their own people, something state acknowledgment cannot address because of federal supremacy in the field of Indian affairs. The tribe would be able to establish and maintain a separate government capable of exercising jurisdictional authority over tribal members and possibly nonmembers. In addition to powers of self-governance, the tribe would have certain protections from state and local government intrusion on their lands and government powers.

Fiscal

From this perspective, federal acknowledgment entitles the group to certain services from the federal government, such as medical and dental care, education funds and support, housing eligibility for certain loans, and legal aid. However, as the bills are currently phrased, addressing the Lumbees' fiscal needs would entail a process different from that experienced by most other acknowledged tribes. While the Lumbee recognition bill, as currently worded, would make tribal members *eligible* for federal services (e.g., health, education, and social services), it provides that such services would be unavailable to tribal members until the Congress specifically *appropriates* the funds; but even then, those appropriations would be considered separate from the outlays set aside for other federally recognized tribes. This was, from a political standpoint, deemed a compromise and necessary measure inserted in the 1989 legislation by the original sponsor, Representative Charlie Rose (D-NC). It was also endorsed by Assistant Secretary of Indian Affairs Ross Swimmer. Rose forwarded the amendment, and the Lumbee leadership accepted it because they believed it would appease some other recognized tribal officials and possibly tribal factions within Robeson County, who objected to Lumbee acknowledgment. The opponents felt that acknowledgment might entail a drastic reduction in their own federal entitlements because of the comparatively large size of the Lumbee tribal population.

The Lumbees would actually be beneficiaries of one of the most important developments that arose from the tribal self-governance demonstration project.[45]

[45]Indian Self-Determination and Education Assistance Act Amendments of 1988, 102 Stat. 2285, 2296 (1988); as amended, 105 Stat. 1278 (1991). The Tribal Self-Governance Demonstration Project is actually a new title, Title III, that was added to the 1975 legislation. This title, as originally enacted, allowed twenty selected tribes to design programs, activities, and services to address tribal priorities and

This involves the member tribes receiving their share of federal funds directly from the Congress after having negotiated an annual written funding agreement with BIA. Theoretically, this should increase the amount of real dollars that reaches the Indian community because by circumventing BIA, fewer dollars are lost to administrative costs.

James Blum of the Congressional Budget Office predicted that "providing services to the tribe [Lumbee] and its members as a result of federal recognition could cost the federal government $120 million annually."[46] Blum further noted that:

> [T]he cost to the federal government to provide services to the Lumbee Tribe would be less than the national average [approximately $3,000 per Indian annually]... [since they are] recognized by the state of North Carolina. As state-recognized Indians, members of the Lumbee Tribe are already eligible for and receive some federal services and benefits including job training and education funding.[47]

More pertinent, Blum acknowledged that the precise amount of new cost to the United States resulting from enactment of the Lumbee bill would be impossible to determine "because the nature of services and programs provided would be negotiated by the tribe and the Secretary of Interior and would be based on the specific needs of the tribe."[48] The Lumbee bill, in short, was written to lower the total cost to the federal government by directly funding the tribe and by delaying the delivery of BIA and Indian Health Services (IHS) to the group, pending congressional appropriation of funds to pay for the services once the tribe's needs had been determined.

There is a powerful paradox generated by these fiscal arrangements. On one hand, since before the turn of the century, tribes have struggled under federal bureaucratic constraints that have rarely allowed tribal governments any genuine decisionmaking authority regarding their lands, natural resources, or administration of justice. On the other hand, by becoming an "acknowledged" tribe, Indian communities, in certain fundamental respects, subject themselves to a considerable amount of federal control over their lives, property, and rights. As Francis P. Prucha observed: "If the federal government retains responsibility... for Indian programs, it must maintain some control over them. But federal control negates full tribal self-determination."[49]

respond to local concerns. Previously, when tribal programs have been managed by the Bureau of Indian Affairs or even under the Indian Self-Determination grants or contracts, most of the decisionmaking and funding priorities were made by the federal bureaucracy. The Self-Governance project allows tribes to be the primary policymaker for the programs and services on their reservations, including the allocation of fiscal resources.

[46]S. Rept. 102-251, 26 November 1991, p. 13.

[47]Ibid.

[48]Ibid.

[49]Francis P. Prucha, *The Indian in American Society* (Berkeley: University of California Press, 1988), p. 90.

The 1988 Lumbee recognition bill, the first major legislation push since 1975,[50] in effect, was stymied by the vigorous objections raised by Assistant Secretary Swimmer that the Lumbees not be allowed to circumvent the administrative process, as well as by the passage of time. Although hearings were held in both chambers, no further action occurred on the House bill, while the Senate measure was approved by a voice vote of the Select Committee on Indian Affairs, with an amendment, and was reported on 30 September 1988. The amendment, previously discussed, authorized the Lumbees to administer federal Indian programs under an annual written funding agreement drawn up between the tribe and the Department of the Interior, instead of the tribe having to contact directly with BIA under the Indian Self-Determination Act of 1975.

Normative

While the legal and fiscal reasons are certainly important, the normative arguments are the most compelling ones inspiring the Lumbees' pursuit of acknowledgment. In a 1980 report, Robert K. Thomas, a Cherokee anthropologist, identified what he perceived as the essence of the Lumbees' struggle for political recognition. After stating that health and education benefits were certainly a sincere motivation for Lumbees, Thomas pointed out that "there is a search for validation going on among Lumbees now. Many would like some official agency to not only validate them as Indians but to validate them as descendants of a historic Indian group." He went on to say that federal recognition was also a "moral point" for Lumbees.

> Many Indians in Robeson County feel as if the federal government has neglected them for too many years. Official recognition on the part of the federal government that they are indeed Indian would be something of an apology and a confession on the part of the federal government that officialdom has been lax in recognizing not only that the Lumbees are Indian but a respectable and worthy community in the world.[51]

It is this conjunction of morality and validation, or legitimation, that lies at the heart of the Lumbees' desire for federal recognition.

The question of specific "tribal" identity is openly debated today. This is, as Thomas showed, a result of two major factors: (1) the Lumbees have generally been misinformed and misled by well intentioned outsiders who, for a variety of reasons, tried to persuade the Lumbees that they belonged to this or that Indian group, or were not really Indian at all, but tri-racial communities; or (2) they want "very much to be able to trace their ancestry to a specific and 'respectable' historic Indian tribe."[52] This combination of misinformation, historical fiction, and desire for "respectability," plus the historical evidence indicating that the Lumbee community is really a blending of three clearly identifiable tribes—Hatteras, Saponi, and Cheraw—has

[50]Congressman Charlie Rose introduced a bill in 1975 that would have made Lumbees eligible for programs for nonfederally recognized tribes, but would not have made them eligible for BIA programs. See *Congressional Research Service Report,* 1991.

[51]Robert K. Thomas, *A Report on Research of Lumbee Origins* (1980). Author has copy of report.

[52]Ibid., p. 62.

led to confusion both within and without the Lumbee community as to who exactly the Lumbee are.

WHY HAVE THE LUMBEE NOT SECURED COMPLETE FEDERAL RECOGNITION?

Having described three important grounds for the Lumbees' pursuit of federal recognition, we shall now examine the factors that have arrested the Lumbee tribe's search for full attainment of federal recognition. For purposes of clarity and organization, we have grouped these factors into four categories: (1) policy/administrative; (2) fiscal/demographic; (3) administrative/legislative; and (4) cultural.

Policy/Administrative

Although the Lumbees have sought federal aid and acknowledgment for slightly more than 100 years, most of the legislative activity has occurred in three distinctive historical eras—1880s to 1924; 1950s; and the 1980s. Coincidentally, two of the three eras—1880s to 1924 and the 1950s—were periods in which the federal government was trying to detribalize Indians by various assimilative measures. The third era, Reagan's New Federalism and so-called "government-to-government" period, which Bush supported in a lukewarm way, while not overtly focused on tribal assimilation, actually entailed a time of heightened concern because of the severe cutbacks in federal expenditures for tribes, and because of several Supreme Court decisions that furthered the diminution of individual Indian and tribal sovereign rights in the areas of criminal law,[53] taxation,[54] zoning of property within reservations,[55] and religious freedom.[56]

In the 1880s to 1924, official federal policy was that of allotment of lands and tribal funds, which, it was assumed, would lead to the gradual assimilation and Americanization of Indians. In the 1950s, the federal government embarked on its last concerted effort to assimilate Indians by legally terminating a number of tribes, bands, and *rancherias*. Moreover, thousands of Indians were encouraged to relocate to large cities in the hope that urban life would facilitate their assimilation into the American economy and society.

Of the three eras, it was the 1950s, and in particular the 1956 law known simply as the Lumbee Act, which has been the center of contention for nearly four decades. After the Lumbees were acknowledged by the state in 1953, they then launched their drive for full federal recognition. Three years later, on 7 June 1956, the Congress passed An Act Relating to the Lumbee Indians of North Carolina.[57] The

[53]*Duro* v. *Reina*, 495 U.S. 676 (1990).

[54]*Cotton Petroleum* v. *New Mexico*, 490 U.S. 163 (1989) and *County of Yakima* v. *Yakima Nation*, 112 S.Ct. 687 (1992).

[55]*Brendale* v. *Confederated Tribes and Bands of Yakima*, 492 U.S. 408 (1989).

[56]*Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) and *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

[57]70 Stat. 254 (1956).

federal law used nearly identical language as the 1953 state law. However, at the request of the Department of the Interior, the agency spearheading the national termination policy, an exclusionary clause was inserted providing that "nothing in this Act shall make such Indians eligible for any services performed by the United States for Indians because of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Lumbee Indians."[58]

In hindsight, this clause seems discriminatory, but it was actually appropriate, considering the political tenor of the times—termination of federal obligations to Indians. The Congress was gearing up to introduce a host of measures that would lead to the termination of federal obligations and services to over 11,000 Indians.[59] This is evidenced in the secretary of the interior's testimony against the original Lumbee bill in 1956: "We are therefore unable to recommend that the Congress take any action which might ultimately result in the imposition of additional obligations on the Federal Government or in placing additional persons of Indian blood under the jurisdiction of this Department."[60]

Ironically, then, the 1956 federal law acknowledged the Lumbees as a distinctive tribe, yet simultaneously deprived or precluded them from the same federal services generally provided to other acknowledged tribes and the applicability of federal Indian statutes tailored for Indian tribes.

More broadly, from a policy perspective, Deloria has argued that the Lumbee effort in the 1950s to secure federal recognition was poorly timed because, as noted earlier, they "ran afoul of the termination policy."[61] The termination policy, however, was a failure, which has since been repudiated at every level of government. "So," says Deloria, "the 1956 act is an anomaly in Federal Indian legislation. Nothing like it had been done prior to that time and nothing like it since then."[62] In short, Deloria was arguing that if the larger aberration—termination—had been disavowed, then termination-inspired provisions, like the 1956 exclusionary clause attached to the Lumbee recognition law, should also be deleted. This has already occurred in a number of cases where terminated tribes have been restored to full federal status as acknowledged sovereign tribes.[63] Thus, for the Lumbees, full, not partial, federal recognition is deemed necessary to correct this policy problem.

The Lumbees also petitioned for federal support in the 1930s—the Indian Reorganization Act (IRA)[64]—which was an era of tribal government reform and of

[58]70 Stat. 254-255 (1956).

[59]See, e.g., Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy, 1953-1961* (Albuquerque: University of New Mexico Press, 1982) and Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986).

[60]U.S. Congress, Senate, Select Committee on Indian Affairs, *Testimony of Arlinda Locklear, Lumbee Staff Attorney, on S. 1036 and H.R. 1426*, 102nd Cong., 1st sess., 1991, p. 7.

[61]U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 2672: Federal Recognition of the Lumbee Indian Tribe of North Carolina*, 100th Cong., 2nd sess., 1988, p. 25.

[62]Ibid.

[63]See, e.g., Menominee Restoration Act, 87 Stat. 770 (1973); Siletz Restoration Act, 91 Stat. 1415 (1977); Paiute Restoration Act, 94 Stat. 317 (1980); Cow Creek Band of Umqua Restoration Act, 96 Stat. 1960 (1982); and Klamath Restoration Act, 100 Stat. 849 (1986).

[64]48 Stat. 985 (1934).

limited tribal self-rule under John Collier's reign as commissioner of Indian affairs. However, while these years were certainly more liberal than the prior fifty years, they were also restrictive in the sense that it was not until the IRA of 1934 that the concept "federal recognition" was expressly declared and utilized as a means to determine "which Indian tribes were to be regarded as recognized."[65] This occurred when Collier, searching for a measure that would save his bill, said that he would be willing to add the phrase "now under Federal jurisdiction" to reduce the number of tribes and individual Indians eligible for federal services. That provision, Collier added, "would limit the Act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help."[66] What it did was to create a trouble zone in Indian affairs by dichotomizing Indian country. In effect, tribes were either "federally recognized" or lumped into a large category of so-called "nonrecognized" tribes. This dichotomization was especially problematic for smaller tribes—tribes that somehow fell between BIA's cracks, and especially for eastern Indian communities which, oftentimes, had never been treated with by the federal government. This combination of tribal polarity, plus confusion over which tribal name to apply to the Lumbees (were they really Cherokees, or were they, as some Smithsonian scholars argued in the 1930s, Cheraw or even Siouan?), foreclosed the passage of any bill that would extend recognition to the tribe in the 1930s.

One additional note on the IRA period is warranted, however. While the law focused on the restoration of some semblance of tribal government authority, Collier also included a provision in IRA to enable unaffiliated (detribalized) Indians, as long as they had "one-half or more Indian blood," to receive federal services and support. This provision also had rough sailing through the Congress. Originally, Collier had wanted to use the one-quarter blood standard. However, the powerful chairman of the Senate Committee on Indian Affairs, Burton K. Wheeler, opposed this measure. He said, "if you pass it to where they are quarter-blood Indians, you are going to have all kinds of people coming in and claiming they are quarter-blood Indian and want to be put upon the Government rolls. . . . what we are trying to do is *get rid of the Indian problem rather than add to it.*"[67] Wheeler was successful, and one-half became the standard quantum of blood placed in IRA.

In 1935, this portion of Section 19 of IRA was tested by a group of Lumbees from Robeson County. BIA initially refused to assist the petitioning Lumbees. But on 8 April 1935, Felix S. Cohen, then assistant solicitor of the Department of the Interior, issued a memorandum to Commissioner Collier's office, detailing the rights of what he termed "non-tribal" Indians under IRA. The memo read:

> Clearly, this group [Lumbees, though Cohen referred to them as Siouan Indians of North Carolina, because that was the latest name in circulation in Washington] is not

[65]Quinn, "Federal Acknowledgement of American Indian Tribes? The Historical Development of a Legal Concept," 332.

[66]U.S. Congress, Senate, Committee on Indian Affairs, *Hearings on S. 2755 and S. 3645, Part 2,* 73rd Cong., 2nd sess., 1934, p. 266.

[67]Ibid., pp. 263-264.

> a recognized Indian tribe now under "Federal jurisdiction" within the language of Section 19 of the . . . [IRA]. . . . These Indians like many other Eastern groups, can participate in the benefits of the Wheeler/Howard Act only insofar as individual members may be one-half or more Indian blood.[68]

Collier responded by sending a physical anthropologist, Carl Seltzer, to Robeson County. Seltzer's virtually impossible task was to determine definitively by researching the Indians' physiological characteristics alone, whether the petitioning tribal individuals met the one-half blood quantum specified in IRA. Seltzer "certified" that twenty-two individuals had the necessary "physical traits" to be listed as half-blood Indians.

Despite having met these dubious scientific criteria, BIA continued to deny any trust responsibility for these individuals until a federal appeals court ruled in *Maynor* v. *Morton* (1975),[69] that BIA had been negligent. The court said that even though Maynor "did not live on a reservation and was not a member of a recognized tribe, he remained eligible for benefits of said Act notwithstanding subsequent passage of the [1956] Lumbee Act."[70]

Fiscal/Demographic

Testifying in 1988, Assistant Secretary of Indian Affairs Ross Swimmer said a major reason for the administration's opposition to Lumbee recognition was "the sheer [financial] impact, which is estimated to be $30 to $100 million per year."[71] Departmental opposition to Lumbee acknowledgment based on fiscal grounds dates as far back as the late-nineteenth century. In 1890, Commissioner Thomas J. Morgan of BIA responded to the Lumbees' request for recognition with the following statement:

> While I regret exceedingly that the provisions made by the State of North Carolina are entirely inadequate, I find it quite impractical to render any assistance at this time. . . . So long as the immediate wards of the government (some 36,000 Indian children) are so insufficiently provided for, I do not see how I can consistently render any assistance to the Croatans or any other civilized tribes.[72]

The Lumbee tribe, as noted earlier, is the largest nonfederally recognized tribe, with some 39,000 enrolled members. It is nearly three times the size of the next largest petitioning tribe. Deloria estimates that the Lumbees account for roughly 60 percent of the indigenous peoples in the United States seeking federal acknowledgment. The elements of large population and the estimated costs of servicing the tribe's membership have been used as evidence by BIA on a number of occasions to oppose many of the Lumbees' legislative attempts to secure recognition. According to recent statements, "BIA officials often privately acknowledge that,

[68]As quoted in Karl A. Funke, "Educational Assistance and Employment Preference: Who Is an Indian?," *American Indian Law Review* 4 (Fall 1976-1977): 26.

[69]510 F.2d 1254 (1975).

[70]Ibid., p. 1255.

[71]U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 2672: Federal Recognition of the Lumbee Indian Tribe of North Carolina,* 100th Cong., 2nd sess., 1988, p. 9.

[72]U.S. Congress, House, H. Rept. 102-215, 24 September 1991, p. 2, note 1.

had it not been for the size of the tribe, [they] would have been recognized long ago."[73]

Lumbee leaders and their congressional advocates have tried to ease the fears of other tribes and BIA staff leery of their population base. Several provisions are included, for example, in the most recent House bill,[74] which give the Committee on Appropriations flexibility to address the needs of the Lumbee constituency without threatening the budgets of other recognized tribes. Section 3(a), for example, requires that any BIA funding for the Lumbee come through a separate appropriation, distinctive from outlays for other recognized tribes. In addition, federal services would not be provided until the Congress specifically appropriated the funds for the tribe. Nevertheless, opposition remains to Lumbee recognition from within BIA and among a number of other recognized and nonrecognized tribes.

Administrative/Legislative

On 2 October 1978, in part as a result of a recommendation by the American Indian Policy Review Commission, and after the introduction of legislation, BIA established an administrative process through which nonfederally recognized tribes could apply for federal acknowledgment. The Bureau of Acknowledgement and Research (BAR) was the office assigned the task of overseeing the development and implementation of what is often referred to as the Federal Acknowledgement Process (FAP).

Although these administratively developed regulations lack specific congressional authority, the Department of the Interior has general authority delegated by the Congress to carry out the federal government's trust obligations to tribes. The regulations laid out "mandatory" criteria that petitioning groups had to meet to qualify as an Indian tribe. These included: a statement of facts that the petitioning tribe has been identified from historical times; evidence that a vast majority of the petitioning group inhabit a specific area that is distinct from other populations; evidence that the group has continuously exercised governing authority over its members; a copy of the group's present governing documents or a statement describing the membership criteria; a list of tribal members; a statement that the membership of the group is composed principally of persons who do not belong to any other tribe; and data that the group was never legally terminated by the federal government.[75]

These criteria, or portions thereof, have been challenged by a number of authorities. Some maintain that the criteria force petitioning groups to exhibit "the same cultural and political profile as tribes already receiving Federal services. [This] is particularly evident in the question of whether a tribe has a constitution, [or] whether a tribe has a definite method of establishing its membership."[76] Others

[73]*Congressional Record,* 102nd Cong., 1st sess., 1991, Vol. 137, p. H6894.

[74]H.R. 334, 6 January 1993.

[75]25 CFR 83.7 (1991).

[76]U.S. Congress, Senate, Select Committee on Indian Affairs, *Testimony of Vine Deloria, Jr. on S. 2672,* 100th Cong., 2nd sess., 1988, p. 26.

have argued that the BAR review process, as carried out by staff historians, anthropologists, and genealogists, is sometimes "inconsistent and often injudicious," and that compounding the situation "is a critical flaw in the petitioning process—denials by BAR personnel that there is comparability of results."[77]

Despite these concerns, a number of congressional leaders and BIA insist that BIA's administrative process, and not the congressional process, is the most appropriate forum for determining tribal federal recognition, and that while it is an imperfect system, it is the most thorough and consistent route to determine the validity of tribal petitions. Ronal Eden, director of BIA's Office of Tribal Services, testifying in 1991, while admitting that the administrative process was imperfect, insisted that the bureau had proposed a set of revisions designed to "amend and clarify the regulations by eliminating outmoded sections, improving the system for considering petitions, providing a new independent appeal procedure and reducing the burden of documentation for petitioners that have had previous unambiguous federal recognition."[78]

A number of recognized tribes, led by the Eastern Band of Cherokees, also support this argument.[79] Conversely, an equally large number of recognized tribes have passed resolutions supporting Lumbee recognition via congressional legislation.[80]

Cultural

Cultural factors, or the lack of same, are, alongside the fiscal reasons, the major, though infrequently expressed rationale, used by Lumbee opponents in their arguments against Lumbees receiving federal recognition. Lumbee detractors, whether tribal, non-Indian, or governmental, have at various times argued that the Lumbees "lack" certain "cultural" features which other recognized tribes are said to possess. Thomas noted this in his 1980 study and said that many local whites and some other tribes express the opinion that Lumbees are not "real" Indians. In other words, they are perceived as not being a "pure genetic race, they do not have a distinctive aboriginal language, and they lack a 'distinct tribal religion'."[81]

These racially based attitudes are further complicated by the fact that Lumbees "present themselves as members of different tribes [i.e., the six other Indian groups inhabiting Robeson County, each claiming to be independent and autonomous] which causes some confusion on the part of many Indians of other tribes."[82] In

[77]William A. Starna, "Public Ethnohistory and Native American Communities: History or Administrative Genocide?," *Radical History Review* 53 (Spring 1992): 126-139.

[78]U.S. Congress, Senate, Select Committee on Indian Affairs, *Hearings on S. 1315: To Transfer Administrative Consideration of Applications for Federal Recognition of an Indian Tribe to an Independent Commission,* 102nd Cong., 1st sess., 1991, p. 73.

[79]For example, the Colorado River Indians, San Carlos Apaches, Ak-Chin, Tohono O'Odham, Cabazon Band of Mission Indians, Nez Perce, White Earth Band of Chippewa, Mississippi Band of Choctaws, and the Blackfeet Tribe have each argued that the Lumbees should continue through the administrative process.

[80]These include the Poarch Band of Creeks, Tlingit and Haida of Alaska, Ft. McDowell Indians, Mashantuckett Pequot, Seminole Tribe, Tunica Biloxi, Penobscot, Red Lake Band of Chippewa Indians, Santee Sioux, Duckwater Shoshone, Oneida Nation, and United Keetowah Band of Cherokees, among others.

[81]Thomas, *A Report on Research of Lumbee Origins,* p. 63.

[82]Ibid.

addition, because the Lumbees did not sign treaties and have never inhabited a reservation, this is sometimes interpreted by certain persons and groups as further proof that the Lumbees may not be a legitimate tribe.

As recently as September 1991, Representative Rhodes, an opponent of the Lumbee recognition bill, argued that "questions about the validity of Lumbees' tribal identity and whether they are in fact a legitimate tribe are very much open to debate." To say that "no one disputes whether they are a tribe is not an accurate statement."[83] Furthermore, in 1992, Chief Philip Martin of the Mississippi Choctaws, a group opposed to Lumbee recognition, submitted a report to Senator Daniel Inouye (D-HI), co-chair of the Committee on Indian Affairs, written by a tribal employee, Kenneth Carleton, which posited that the Lumbees were merely a "tri-racial isolate," with the emphasis being on their alleged African ancestry.

Martin's report was immediately challenged by a variety of nationally known historians and other social scientists who have researched the Lumbee tribe for many years. In addition, many resolutions from various tribes and one from the National Congress of American Indians were sent in support of the Lumbee tribe.

CONCLUSION

A termination point to the Lumbee "Trail of Many Years" is not yet in sight. The overwhelming preponderance of evidence suggests that the Lumbee tribe meets both the ethnological and legal-political criteria that the federal government utilizes to determine the Indian groups to which the United States has obligations.

Yet, the Lumbee tribe is unique in a multitude of senses: from their distinctive genetic background, to their location in a county almost evenly divided between African Americans, Euro-Americans, and indigenous Americans, and to the relative absence of legally and anthropologically recognized aboriginal cultural characteristics (e.g., aboriginal language and traditional ceremonies). Although their culture "is very interesting, and much more distinctive and 'Indian' than one would think,"[84] they are a people still struggling to establish more amicable political relations with other tribes, the United States, and among themselves.

Many external issues are equally problematic. The first and largest question involves the meaning of tribes being formally admitted into the intergovernmental matrix in a direct government-to-government relationship with the United States. From a theoretical and political perspective, recognized tribes, despite their acknowledged sovereign status, find themselves in a legal/political quagmire. On one hand, federal recognition is an explicit affirmation of the political sovereignty of tribes; on the other hand, the U.S. Supreme Court has held in a number of cases that because tribal rights are not constitutionally delineated, the political branches may exercise virtually absolute power over tribal treaty, property, and sovereign rights. In short, recognized tribes are, in a real sense, in a subordinate, dependent relationship to the United States, existing at the "sufferance of Congress."[85] They

[83]*Congressional Record*, 102nd Cong., 1st sess., 1991, Vol. 137, p. H6890.
[84]Thomas, *A Report on Research of Lumbee Origins*, p. 62.
[85]*United States* v. *Wheeler*, 435 U.S. 313 (1978).

do not even share in the "political safeguards" of federalism said to be enjoyed by the states.[86] Yet, once a tribe is formally acknowledged by the United States, in some basic governmental senses, its status is elevated above that of the surrounding states. As one federal court stated: "Indian tribes are not states. They have a status higher than that of states."[87]

However, federal acknowledgment of tribal sovereignty is further complicated because of the secretary of the interior's recent dichotomization of tribes as either "historic" entities with a full compliment of governmental powers, or "created" entities, like the Pascua Yaqui, with limited governing capabilities.

Finally, what effect would Lumbee acknowledgment have on their long-standing relationship with the State of North Carolina and its counties and municipalities? The language of the most recent Lumbee federal bill explicitly authorizes the state to maintain civil and criminal jurisdiction over any lands belonging to the tribe. However, it also provides that the secretary of the interior could accept any transfer by the state of any portion of that jurisdiction in the future, pursuant to a Lumbee-state agreement, though such a transfer would not become effective until two years after the effective date of the agreement. It says nothing, however, about such issues as education, taxation, or Indian gaming. These are areas that have led to bitter jurisdictional conflicts between tribes and states.

Each tribe's relationship with the federal and state governments is distinctive, and the Lumbee situation is particularly unique from a political-historical-cultural perspective. It is safe to say that the Lumbees' evolving relationship with the State of North Carolina and their budding relationship with the federal government will remain fluid. The passage of a federal law explicitly acknowledging the tribe, if it ever occurs, will have an unpredictable impact on intra-tribal, inter-tribal, and intergovernmental relations.

[86] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).
[87] *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131, 134 (1959).